Nos. 96-1550 and 1551

Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE WISCONSIN ACADEMY OF TRIAL LAWYERS, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE INDIANA TRIAL LAWYERS ASSOCIATION, THE IOWA TRIAL LAWYERS ASSOCIATION, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE SOUTHERN POVERTY LAW CENTER SUPPORTING PETITIONERS

WILLIAM F. CONOUR
CONOUR-DOEHRMAN
1 Indiana Square, Suite 1725
Indianapolis, IN 46204
Attorney for The Indiana Trial Lawyers Association

RICHARD M. SKUTT
220 Bagley, Suite 808
Detroit, MI 48226-1412
Attorney for The Michigan Trial Lawyers Association

JEFFREY WHITE
1050 - 31st Street, N.W.
Washington, DC 20007
Attorney for The Association of Trial Lawyers of America

ELLEN M. BOWDEN
400 Washington Avenue
Montgomery, AL 36104-4344
Attorney for Southern Poverty Law Center

DANIEL A. ROTTIER
Counsel of Record
DAVID E. SUNBY
HABUSH, HABUSH, DAVIS ROTTIER, S.C.
150 East Gilman Street, Suite 2000
Madison, WI 53703
Attorneys for Wisconsin Academy of Trial Lawyers

BRIAN J. LAMPERT
Chairman Amicus Committee
DON, HILLER & GALLEHER
1737 Gaylord Street
Denver, CO 80206
Attorney for The Colorado Trial Lawyers Association

STEVEN J. CROWLEY
P.O. Box 945
Burlington, IA 52601
Attorney for The Iowa Trial Lawyers Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISIONS OF THE COURTS BELOW AND IN *NASH* EFFECTIVELY MAKE IT IMPOSSIBLE FOR BLIND CITIZENS TO ACHIEVE PROCEDURAL DUE PROCESS WHEN SEEKING TO PROTECT THEIR VESTED PROPERTY INTERESTS	5
A. The Private Interests Which Are Affected by the Actions of Federal Agencies Such as the DVA Are Substantial	6
B. Given the Decisions of the Courts Below and the *Nash* Court, the Risk of an Erroneous Deprivation of the Property Rights of Blind Vendors Is Very Great, and the Probable Value of the Substitute Procedural Safeguards Suggested Below Are Very Low	8
C. The Government's Interest in Not Vesting Remedial Powers in the Randolph-Sheppard Panels Is Insubstantial	11
II. THE DISTRICT COURT DECISION, AFFIRMED BY THE COURT OF APPEALS BELOW, IS FUNDAMENTALLY FLAWED FROM THE PERSPECTIVE OF BOTH PROCEDURAL AND CONSTITUTIONAL LAW	12
A. The District Court Did Not Dispose of This Case in a Manner Which Is Appropriate Under the Federal Rules of Civil Procedure or Permitted Under the Administrative Procedure Act	13

TABLE OF CONTENTS—Continued

Page

B. The Decisions of the District Court and the Court of Appeals Below Effectively Have Closed the Courthouse Doors to Judicial Review of a Randolph-Sheppard Arbitration Decision 16

III. AS MATTERS STAND, IT WOULD BE PREFERABLE TO HAVE A JUDICIAL REMEDY FASHIONED BY THIS COURT RATHER THAN HAVE THE RIGHTS OF THE BLIND SUBJECT TO A DEFECTIVE ARBITRATION PROCEDURE 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16
Arnett v. Kennedy, 416 U.S. 134 (1974) 6
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 18
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 6
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14
Delaware Department of Health and Social Services v. United States Department of Education, 772 F.2d 1123 (3rd Cir. 1985) 10
FTC v. Cement Institute, 333 U.S. 683 (1948) 16
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 18
Georgia Department of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990) 3, 4, 5
Goldberg v. Kelly, 397 U.S. 254 (1970) 6, 7
Maryland State Department of Education v. United States Department of Veterans Affairs, 896 F.Supp. 513 (D. Md. 1995) 10, 13, 15
Maryland State Department of Education v. United States Department of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996) 9
Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 6, 11
Minnesota Department of Jobs & Training v. Riley, 18 F.3d 606 (8th Cir. 1994) 10
Minnesota Department of Jobs & Training v. Riley, 107 F.3d 648 (8th Cir. 1997) 10, 18, 19
Morrissey v. Brewer, 408 U.S. 471 (1972) 6
Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986) 4, 9

Statutes and Rules

5 U.S.C. § 701 16
5 U.S.C. § 706(2)(A) 13
20 U.S.C. § 107 3
20 U.S.C. § 107(b) 7, 12
20 U.S.C. § 107a(b) 7
20 U.S.C. § 107b 11

TABLE OF AUTHORITIES—Continued

	Page
20 U.S.C. § 107b(2)	7
20 U.S.C. § 107b(3)	7
20 U.S.C. § 107b(6)	7
20 U.S.C. § 107d-1	*passim*
20 U.S.C. § 107d-1(a)	3, 15
20 U.S.C. § 107d-1(b)	3, 4, 12
20 U.S.C. § 107d-2	7, 8, 9
20 U.S.C. § 107d-2(a)	16, 18
20 U.S.C. § 107d-3(a)	7
20 U.S.C. § 107-1(b)	3
34 C.F.R. § 395.30	6
34 C.F.R. § 395.31	6
34 C.F.R. § 395.32	8, 12
34 C.F.R. § 395.35	9, 12
34 C.F.R. § 395.36	9, 12
34 C.F.R. § 395.4	7
34 C.F.R. § 395.5	7
34 C.F.R. § 395.5(5)	8
34 C.F.R. § 395.6	7, 8
34 C.F.R. § 395.7	7
34 C.F.R. § 395.8	7, 8
34 C.F.R. § 395.9	8
34 C.F.R. § 395.10	8
34 C.F.R. § 395.11	7

Other Authorities

Sup. Ct. R. 37	2
Sup. Ct. Order of January 21, 1963, amending Fed. R. Civ. P. (Dissent of Justices Black & Douglas)	14
Administrative Procedure Act	13, 14, 15, 16
Randolph-Sheppard Act	16
Senate Report 93-937	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-1550 and 1551

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF *AMICI CURIAE* THE WISCONSIN ACADEMY OF TRIAL LAWYERS, THE COLORADO TRIAL LAWYERS ASSOCIATION, THE INDIANA TRIAL LAWYERS ASSOCIATION, THE IOWA TRIAL LAWYERS ASSOCIATION, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND THE SOUTHERN POVERTY LAW CENTER SUPPORTING PETITIONERS

This Brief *Amici Curiae* of the Wisconsin Academy of Trial Lawyers,[1] Colorado Trial Lawyers Association, Indiana Trial Lawyers Association, Iowa Trial Lawyers Association, Michigan Trial Lawyers Association, Associa-

---

[1] In accordance with Supreme Court Rule 37.4 this brief has primarily been authored by counsel for the Wisconsin Academy of Trial Lawyers with assistance from the other named *Amici*. No other entity has made a monetary contribution to the preparation or submission of the brief.

tion of Trial Lawyers of America, and the Southern Poverty Law Center is submitted pursuant to Supreme Court Rule 37 and has been consented to by the Office of the Solicitor General pursuant to a letter dated May 28, 1996 and by counsel for the Petitioners.

STATEMENT OF INTEREST

The Trial Lawyers represent trial attorneys across the United States who are dedicated primarily to the rights of tort victims. The Trial Lawyers are dedicated to the rule of law and seek to insure that the Justice system in this Nation functions in a manner calculated to insure fundamental fairness for tort victims according to the precepts of Constitutional Law.

Founded in 1971, the Southern Poverty Law Center is a nonprofit organization dedicated to protecting victims of injustice. The Center has brought countless civil rights cases on behalf of minorities, women, poor people in need of health care, mentally ill persons, children in foster care, prisoners and many other persons subject to unfair treatment based on their membership in a disadvantaged group. *Amici* has an interest in this case because it is committed to ensuring that all persons receive the benefits to which they are entitled under federal law.

STATEMENT OF THE CASE

The *Amici* adopt by reference the Statements contained in the Petitions for a Writ of Certiorari filed in this case by the Maryland State Department of Education, Division of Rehabilitative Services ("MSDE") and the National Federation of the Blind ("NFB").

SUMMARY OF ARGUMENT

Blind vendors operating pursuant to the Randolph-Sheppard Act in the Fourth and Eleventh Circuits face a substantial risk of erroneous deprivation of their private property rights without due process safeguards. By limiting these vendors to arbitration panels whose findings are unenforceable, the Courts below have effectively reduced the constitutional rights of these blind individuals.

In addition, the District Court's decision has inappropriately disposed of this case by disregarding the tenets of the Federal Rules of Civil Procedure and the Administrative Procedure Act effectively closing the courthouse doors to judicial review of a Randolph-Sheppard arbitration decision.

ARGUMENT

The *Amici* respectfully submit that certain blind citizens in this Nation have been in many instances unfairly and unconstitutionally deprived of basic Procedural Due Process in terms of how their rights are adjudicated under the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.* (the "Act"). The latest and most egregious manifestation of the low regard that some federal agencies have for the rights of these blind vendors is to be found within the four corners of the decision of the Court below.

Blind vendors operating on Federal property pursuant to the Act have no options available to them when their livelihood is threatened. The only mechanism provided to resolve any infringement of the vendors' rights is arbitration. In fact, by the terms of 20 U.S.C. § 107-1, a blind vendor working on federal property does not even have the right to proceed directly against a federal agency that is acting in violation of his or her civil rights.

If a blind citizen working on Federal property as a vendor objects to actions of the federal agency charged with administering that property, that blind citizen must rely on the good faith and diligence of a state licensing agency ("SLA"), such as the MSDE, to make an effort to vindicate that citizen's rights by arbitration under § 107d-1(b). Presumably, if a federal agency fails to provide to a blind vendor adequate heat, electricity, or protection from harassment in the workplace by the terms of 20 U.S.C. § 107d-1(a), the most that a blind vendor can do is encourage, by arbitration if necessary, an SLA to take action on his or her behalf. In *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), the Court found that:

> [20 U.S.C. § 107d-1] (a)'s broad language would still entitle the vendor to invoke the remedial procedures provided in that subsection *but only in order to exercise his procedural right to complain.* Although this procedural right gives the vendor no substantive remedy, the right is not entirely empty. It guarantees the vendor *an opportunity to convince the state agency to take action*—to file a complaint pursuant to subsection (b)—even though the agency has discretion not to act. [Emphasis supplied].

Id. at 1488.

Although harsh, the decision in *Nash* did not leave a blind vendor completely without recourse. If a diligent and responsible SLA, such as the one in the case at bar, determined that a federal agency was acting in contravention of the civil rights of a blind citizen working on that agency's property, that SLA could still pursue a remedy against such an agency under 20 U.S.C. § 107d-1(b). At least that appeared to be the case until the decision of the Courts below in the case at bar. Relying on *Nash*, the Court below affirmed the District Court's conclusion that a 20 U.S.C. § 107d-1(b) panel had no remedial powers whatsoever.

As a result, blind vendors, in the Fourth and Eleventh Circuits at least, have nowhere to turn in the event that they find themselves aggrieved by the action of a federal agency charged with administering property where they make a living. They cannot commence a civil action in any court because the arbitration mechanism established to resolve disputes involving "any action arising from the operation or administration of the vending facility program [20 U.S.C. § 107d-1(a)]" has been held to be the exclusive method for resolving such disputes. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

Although the clear import of the decisions below and the decision in *Nash* is that an arbitration panel under the Act has no remedial power, the Courts below have gone

further than *Nash* and have effectively closed the courthouse door to any effort to secure judicial review of those panel decisions. The foregoing is particularly troubling because, as noted in the NFB's Petition in this case, the Randolph-Sheppard Act is a federal statute that creates a property interest in the blind who must make their living on Federal property. *Petition of the NFB for a Writ of Certiorari*, p. 20-21.

I. THE DECISIONS OF THE COURTS BELOW AND IN *NASH* EFFECTIVELY MAKE IT IMPOSSIBLE FOR BLIND CITIZENS TO ACHIEVE PROCEDURAL DUE PROCESS WHEN SEEKING TO PROTECT THEIR VESTED PROPERTY INTERESTS.

This Court has carefully established the essential parameters and minimum guarantees of Procedural Due Process in a number of cases. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court emphasized:

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Wolff v McDonnell, 418 US 539, 557-558, 41 L Ed 2d 935, 94 S Ct 2963, 71 Ohio Ops 2d 336 (1974). See, e.g., Phillips v Commissioner, 283 US 589, 596-597, 75 L Ed 1289, 51 S Ct 608 (1931). See also Dent v West Virginia, 129 US 114, 124-125, 32 L Ed 623, 9 S Ct 231 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, . . . is a principle basic to our society." Joint Anti-Fascist Comm. v McGrath, 341 US 123, 168, 95 L Ed 817, 71 S Ct 624 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Armstrong v Manzo, 380 US 545, 552, . . .

Id. at 333.

This Court has made it clear that " 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether administrative procedures are Constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974).

In reliance on *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970), this Court stated in *Mathews v. Eldridge*, *supra*:

> . . . [O]ur prior decisions indicated that identification of the specific dictates of due process generally requires consideration of three distinct facts; First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-335.

Applying this litmus test, it is clear that significant Procedural Due Process protections ought to be available to blind vendors under the Act.

A. The Private Interests Which Are Affected by the Actions of Federal Agencies Such as the DVA Are Substantial.

The private property interests of the blind, and the SLAs for that matter, are substantial. In order to insure that blind licencees have employment opportunities, the Act authorizes SLAs to secure space on property owned by federal agencies sufficient to accommodate blind vendor stands. *See, e.g.*, 34 C.F.R. § 395.30 and § 395.31. A

blind vendor who secures a license from an SLA to operate a blind vending stand on Federal property in effect receives a license to operate a small private business enterprise in partnership with an SLA under the authority of 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7. The blind licensee does not have a completely free hand to run this business any way he sees fit. For example, 20 U.S.C. § 107d-3(a) allows an SLA to place a ceiling on the amount of income that a blind licensee can receive from vending machines on Federal property. *Cf.* 34 C.F.R. § 395.5 and § 395.8.

However, the blind licensee is given incentives and the ability to succeed as a small business owner which offset any limitations on the licensee's opportunities. Pursuant to 34 C.F.R. § 395.11, SLAs are required to provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. Moreover, each SLA must, in issuing licenses for the operation of blind vending facilities on Federal property, give preference to blind persons in need of employment. 20 U.S.C. § 107a(b).

The resulting blind business operation clearly constitutes a property right of the blind licensee who works on Federal property, not unlike the property interests at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970). These property interests are defined clearly in 20 U.S.C. § 107b(2) and (3).

Obviously, Congress recognized the need for Due Process protection of the property rights thus created, because, in addition to the provisions of 20 U.S.C. §§ 107d-1 and 107d-2, Congress specified in § 107b(6) that "any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program [must have] an opportunity for a *fair hearing* [emphasis supplied]" and then made a pointed cross-reference to § 107d-1.

There are other equally compelling reasons to conclude that the private interests of blind vendors working on Federal property are substantial and require protection by recourse to some form of a fair hearing dispute resolution mechanism. Blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal property managers (34 C.F.R. § 395.32). The working conditions and other conditions of employment of the blind vendor working on Federal property are also regulated in detail by SLAs. 34 C.F.R. § 395.6 and § 395.10. In this regard, a state licensing agency is, in fact, authorized to assume some of the responsibilities customarily performed by an employer *vis-a-vis* a blind vendor. For example, a state licensing agency is authorized to set aside funds from the net proceeds of the operation of vending facilities for the purposes of "the establishment . . . of retirement and pension funds, health insurance contributions, and provisions for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.5(5).

B. Given the Decisions of the Courts Below and the *Nash* Court, the Risk of an Erroneous Deprivation of the Property Rights of Blind Vendors Is Very Great, and the Probable Value of the Substitute Procedural Safeguards Suggested Below Are Very Low.

The *Amici* first take note of the arguments made in Section III of the *Amicus Curiae* Brief of the National Council of State Agencies for the Blind ("NCSAB") in the case at bar. The Randolph-Sheppard Act not only creates and vests property rights in blind vendors working on Federal property, but the arbitration mechanism in 20 U.S.C. §§ 107d-1 and 107d-2 is the only vehicle for vindicating the personal civil rights of those blind vendors. As noted in the NCSAB Brief *Amicus Curiae,* neither the EEOC nor any other federal agency has jurisdiction to vindicate those rights. Indeed, Congress mandated that SLAs and Federal property managers

must cooperate to insure compliance with civil rights and other laws by blind vendors on Federal property. 34 C.F.R. § 395.35 and § 395.36. Against that background, the Trial Lawyers respectfully ask the Court to consider the following.

As noted by the Court below, the Randolph-Sheppard Act is an employment act designed "to 'provid[e] blind persons with remunerative employment, enlarg[e] the economic opportunities of the blind, and stimulat[e] the blind to greater efforts in striving to make themselves self-supporting.' " *Maryland State Department of Education, Division of Rehabilitative Services v. U.S. Department of Veterans Affairs*, 98 F.3d 165, 167 (4th Cir. 1996) (the decision below). The Court below acknowledged that Congress enacted 20 U.S.C. § 107d-1 and § 107d-2 " 'to provide the means by which aggrieved [blind] vendors and State agencies may obtain a final and satisfactory resolution of disputes.' " *Id.* at 171.

The only forum available for the vindication of the rights of the blind under the Act is an *ad hoc* arbitration panel convened by the Secretary of Education pursuant to 20 U.S.C. § 107d-1. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 102-103 (D.C. Cir. 1986).

In direct disregard of the decision in *Weinberger*, and a number of other decisions of other Courts from other Circuits,[1] the Court of Appeals below affirmed the District

---

[1] According to the Court in *Weinberger*:

> Surely, Congress contemplated that disputes between state agencies and government agencies could involve contract awards, such as the one at issue here. *Congress nevertheless set up an arbitration scheme instead of authorizing direct resort to federal court. As Justice Brandeis stated the "well settled" rule: "where a statute creates a right and provides a special remedy, that remedy is exclusive."* United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 465, 63 L.Ed. 1011 (1919) (citations omitted). Thus, where Congress has created an

Court's holding that an arbitration panel convened pursuant to 20 U.S.C. § 107d-1 "has no remedial powers whatsoever." *Maryland State Department of Education, Division of Rehabilitative Services v. U.S. Department of Education*, 896 F. Supp. 513, 517 (D. Md. 1995) (the District Court decision below). The Court of Appeals below further affirmed the District Court and held that an award of an arbitration panel convened under the Act to resolve a dispute between an SLA and a federal property manager could not be enforced in Federal Court. 98 F.3d at 168.

While the District Court below stated that it was clear that the Randolph-Sheppard Act applied to the DVA and the VCS (896 F. Supp. at 515, n.7), the District Court below nevertheless concluded:

> This Court finds itself in agreement with [the decision in *Nash*] . . . that '[a 20 U.S.C. § 107d-(b)] panel . . . [by] the Act's express terms, *has no remedial powers whatsoever.* It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself.' *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482, 1492 (5th Cir. 1990). [Emphasis supplied].

896 F. Supp. at 517. In affirming the decision of the District Court on October 22, 1996, the Court of Appeals below stated:

> While it may have been wiser for Congress to have provided for an automatic review of the remedial

---

arbitration scheme as the administrative method for enforcing a statutory right, there is a strong presumption that it is exclusive [Emphasis supplied].

See, also, Delaware Department of Health and Social Services, 772 F.2d 1123 (3rd Cir. 1985); *Minnesota Department of Jobs & Training v. Riley*, 18 F.2d 681 (8th Cir. 1994); *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997). Other decisions to the same effect are cataloged at pp. 10-11 of the NFB's *Petition for a Writ of Certiorari.*

> steps taken by a federal entity in response to an arbitration decision, *the fact that Maryland is left without such a review* is not 'so gross as to shock the general moral or common sense.' [Emphasis supplied].

98 F.3d at 170-171.

The Trial Lawyers submit that the course charted by the Courts below and by the *Nash* Court, within the terms of *Mathews v. Eldridge*, *supra*, entails a very substantial "risk of an erroneous deprivation (424 U.S. at 335)" of the private civil and property rights of blind citizens who must work on Federal property. By contrast the "substitute procedural safeguards (424 U.S. at 335)" suggested by the Courts below and *Nash* hold little "probable value" because vesting authority to administer a remedy in the head of an offending federal agency in itself violates Procedural Due Process, as detailed by the NFB in its Petition. *NFB Petition for a Writ of Certiorari*, pp. 19-22.

C. The Government's Interest in Not Vesting Remedial Powers in Randolph-Sheppard Panels Is Insubstantial.

The DVA has not articulated any substantial reason why the arbitration panels should be without remedial powers, other than to say that such a conclusion is consistent with the holding in *Nash*. The DVA has suggested in the Court below that blind vending facilities may compete with the Veterans Canteen Service ("VCS"), and it has further suggested that a blind vending facility might compromise the integrity of VAMC's medical mission. However, whatever the objections of the DVA to a blind vending facility, there is no indication that the DVA ever attempted to obtain approval from the agency charged with administering the Randolph-Sheppard Act for the actions which it has taken in the case at bar under 20 U.S.C. § 107(b), which provides:

> Any limitation on the placement or operation of a vending facility based on a finding that such place-

> ment or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination along with supporting documentation, in the Federal Register.

Because the DVA has never even attempted to seek such approval, it is in a poor position to argue that the arbitration panel decision below is unreasonable. Indeed, as suggested in the Brief *Amicus Curiae* of the NCSAB in the case at bar, the more active involvement of the Secretary of Education under 20 U.S.C. § 107(b) may ameliorate any perceived problems with vesting remedial powers in panels convened under the Act and may well have made this present litigation unnecessary.

The refusal of the DVA to acknowledge the remedial powers of a 20 U.S.C. § 107d-1(b) panel is especially troubling when it is remembered: a) Congress mandated that state licensing agencies and federal property managers must cooperate to insure compliance with civil rights and other laws by blind vendors on Federal property. 34 C.F.R. § 395.35 and § 395.36; and b) At least in part, federal property managers such as the DVA have the right to exercise control over income belonging to blind vendors (34 C.F.R. § 395.32), which right obviously carries with it fiduciary responsibilities.

II. THE DISTRICT COURT DECISION, AFFIRMED BY THE COURT OF APPEALS BELOW, IS FUNDAMENTALLY FLAWED FROM THE PERSPECTIVE OF BOTH PROCEDURAL AND CONSTITUTIONAL LAW.

There are a host of respects in which the decisions of the Courts below are deficient and directly affect the Due Process rights of the blind.

The Trial Lawyers respectfully submit that the Courts below have misread and misapplied the provisions of the Administrative Procedure Act (APA) in the case at bar to the procedural and substantive detriment of the blind citizens who must make their living on Federal property. In order to place this argument in proper perspective, it is necessary to analyze the precise holding of the District Court below.

A. The District Court Did Not Dispose of This Case in a Manner Which Is Appropriate Under the Federal Rules of Civil Procedure or Permitted Under the Administrative Procedure Act.

The District Court was clearly frustrated by the failure of the MSDE and the DVA to reach a settlement in the case at bar. 896 F. Supp. at 515-516. The District Court noted that the MSDE had objected to a suggestion that the District Court hold a *de novo* evidentiary hearing, because only the arbitration panel could hold such a hearing. *Id.* Because of the MSDE's objection, the District Court did not hold a hearing, and did not remand this matter to the arbitration panel for a further evidentiary hearing.

The case was before the District Court on cross-motions for summary judgment. 896 F. Supp. at 515-516. The District Court, having been asked by the MSDE to review the arbitration decision under the APA, stated in this regard:

> . . . [W]hether this Court proceeds under the APA or under its equity powers, this Court runs into the same problem, namely that there exist relevant and material issues of disputed fact concerning whether the [DVA] Secretary's June 1, 1995 Order lacks a "rational basis" or that the Secretary's actions in issuing that Order were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Sec. 706(2)(A).

Id. at 517-518.

The Trial Lawyers respectfully submit that the foregoing highlights two difficulties with the decision of the District Court.

First, the District Court granted summary judgment in favor of the DVA despite the fact that there were "relevant and material issues of disputed fact" which were unresolved in the case at bar. In so doing, the District Court disposed of this case in a manner that is inconsistent with one of the fundamental tenets of summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). As Justices of this Court have observed, the Federal Rules of Civil Procedure are closely related to substantive rights and Procedural Due Process.[2] The manner in which the District Court disposed of the case at bar creates at least the appearance of judicial indifference to adherence to proper procedure when adjudicating the civil rights of the blind, and may have unintended consequences for those rights in other circumstances. While this Court is not primarily an error-correcting tribunal it should address such an impression of procedural indifference.

Second, and far more important, the District Court was manifestly confused about the Court's responsibility under the APA in the case at bar. Throughout its decision, the District Court was under the impression that it was being called upon to review the actions of the Secretary of Veterans Affairs under the APA. For example, after identifying the DVA as the author of a June 1, 1995 Order (896 F. Supp. 515), the District Court states, "Were this Court required to reach the APA issue, . . . this Court would find that the [MSDE] has not established

---

[2] *See Dissent of Justices Black & Douglas* to the Order of January 21, 1963 Amending the Rules of Civil Procedure, and *Dissent of Justice Black* to the Order of February 28, 1966 Amending The Federal Rules of Civil Procedure, as reprinted in *Federal Civil Judicial Procedure and Rules*, pp. 29-34 (West 1997).

a) that the Secretary has acted in an 'arbitrary or capricious' manner or b) that the Secretary's June 1, 1995 Order otherwise violates Sec. 706 of the APA." 896 F. Supp. 517.

In fact, the APA review mandated by 20 U.S.C. § 107d-1(a) is for the action of the Secretary of Education, by and through the arbitration panel he convened under 20 U.S.C. § 107d-1. The Department of Education administers the Randolph-Sheppard Act, and the DVA is an administratee, not an administrator under the Act.

The District Court's error in concluding that the acts of the DVA Secretary are to be reviewed under the APA, undoubtedly helped move the Courts below and the *Nash* Court in the direction of concluding that it was and is the head of a federal agency who must administer and apply the remedy under the Act. According to the District Court:

> It is in that context that this Court finds itself in agreement with [*Nash*] Chief Judge Tjoflat's view that '[t]he [20 U.S.C. § 107d-1] (b) panel . . . under the Act's express terms, has no remedial powers whatsoever. It may determine that certain of the federal entity's acts violate the Act, but the Act leaves responsibility for remedying the violation to the federal entity itself.'

Id. at 517.

It is precisely the error of concluding that the actions of the DVA Secretary, instead of the actions of the Education Secretary, are the subject of APA review which the NFB addresses at pp. 20-22 of its *Petition for a Writ of Certiorari* in the case at bar. As the NFB argues, the decision of the Courts below have created a Constitutional problem where none existed before by finding that a party to an arbitration panel adjudication is to be the one who administers the remedy for a violation found to exist by that panel.

The Department of Education administers the Randolph-Sheppard Act, and the DVA is an administratee, not an administrator under the Act. Nor is this case subject to the analysis in *FTC v. Cement Institute*, 333 U.S. 683 (1948), where the Court endorsed an administrative procedure that included the opportunity to produce evidence, testimony, cross-examination and argument to the decision maker.

B. The Decisions of the District Court and the Court of Appeals Below Effectively Have Closed the Courthouse Doors to Judicial Review of a Randolph-Sheppard Arbitration Panel Decision.

To the *Amici* it is inconceivable that the Courts below have effectively closed the courthouse doors completely to an SLA's efforts, to vindicate the rights of the blind by seeking judicial review in Federal Court.

A decision such as the one below disregards entirely the clear and obvious mandate of 20 U.S.C. § 107d-2(a), which latter provision provides in pertinent part that an arbitration panel convened under the Act:

> . . . shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision *which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.* [Emphasis supplied].

This Court has made it clear that under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, a party aggrieved or adversely affected by a final agency action has an almost absolute right to judicial review of such an action. In *Abbott Laboratories v. Gardner*, 387 U.S. 1339-41 (1967), this Court observed:

> [A] survey of our cases shows that judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . discretion, 5 USC § 701(a).

> . . . The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 USC § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. Shaughnessy v Pedreiro, 349 US 48, 51, 99 L ed 868, 873, 75 S Ct 591; see United States v Interstate Commerce Comm'n, 337 US 426, 433-435, 93 L ed 1451, 1459, 1460, 69 S Ct 1410; Brownell v Tom We Shung, supra; Heikkila v Barber, supra. Again in Rusk v Cort, supra, 369 US at 379-380, 7 L ed 2d at 816, 817, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the court's restrict access to judicial review.

In refusing to enforce the decision of the arbitration panel in the case at bar, the Court below closed the courthouse doors to judicial review of a final agency action, which is directly contrary to the settled practice of this Court.

In the case of arbitration panels convened pursuant to 20 U.S.C. § 107d-1, there is "persuasive," indeed irrefutable, reason to believe that Congress intended that the award of such a panel would be subject to judicial review. The decision of the Court below not only effectively denies blind citizens Procedural Due Process; it is directly contrary to what this Court has recognized as the policy of Congress in enacting legislation:

> 'Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or

> to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.' S Rep No. 752, 79th Cong., 1st Sess, 26 (1945).

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 671 (1945).

This Court has stated that where substantial doubt about Congressional intent exists, the general presumption favoring judicial review of administrative action is controlling. Here, there is manifest evidence that Congress specifically intended that the final agency actions of the Secretary of Education, by and through the arbitration panels convened under the Act, were to be reviewable under the APA, as is clear from the face of 20 U.S.C. § 107d-2(a).

III. AS MATTERS STAND, IT WOULD BE PREFERABLE TO HAVE A JUDICIAL REMEDY FASHIONED BY THIS COURT RATHER THAN HAVE THE RIGHTS OF THE BLIND SUBJECT TO A DEFECTIVE ARBITRATION PROCEDURE.

The blind are either forced to endure unending litigation such as that in the Eighth Circuit [8] or must face the prospect of having no effective and efficient method to redress their rights, as is the case under the decisions of the Courts below and *Nash*. The *Amici* submit that it would be better for this Court to fashion a remedy for the blind, as it did for the victims of sex discrimination in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), than to allow the civil rights of the blind to be thus abused.

In *Senate Report 93-937*, p. 20 (J.A. 157), the Committee on Labor and Public Welfare stated as follows, in a section entitled "Arbitration and Judicial Review:"

---

[8] *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

> The bill creates two new sections of the Act which establish the machinery for a *grievance resolution procedure*. . . . The Committee considers the arbitration procedures contained in S. 2581 to be valuable tools for the *resolution of disputes*. Under current circumstances, machinery for *prompt and satisfactory disposition* of blind licensee and state agency *complaints* does not exist. . . . The Comptroller General's Report [reproduced in full in the Addendum to this Brief] states that HEW and state agencies are still *without recourse* from decisions of federal agencies regarding blind vendor facilities on property they control. Moreover, *blind vendors have attempted to bring their grievances to the judicial system* for resolution. In the case of *Wilson v. Blount*, for example, the U.S. District Court . . . held that the plaintiff blind vendor had no standing to challenge the legal basis of the decision of the Postmaster General. . . . *It is the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will provide the means by which aggrieved vendors and state agencies may obtain a final and satisfactory resolution of disputes.* [Emphasis supplied].

What has happened in the Eighth Circuit cannot be characterized in any sense as a prompt and satisfactory disposition of the blind vendor's grievances in that case.[4] What happened in the case at bar likewise cannot be characterized as a superior method of achieving a final and satisfactory resolution of a dispute under the Act. If the efforts of Congress to achieve a fair hearing for blind citizens who must make their living on Federal mandates concerning Procedural Due Process, were insuffi-

---

[4] "Nine years later, the [Veterans Administration] is still at it, demanding the right to install machines that would, as the district found, destroy the blind vendor's livelihood. It is time for the [Veterans Administration's] scorched-earth campaign to end." *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

cient, then perhaps this Court can find some other way to vouchsafe the personal civil rights and property rights of blind citizens who must make their living on Federal property.

CONCLUSION

Based on the foregoing the *Amici* respectfully request that the Court grant the Petition for Writ of Certiorari of the National Federation of the Blind and Maryland State Department of Education, Division of Rehabilitation Services.

Respectfully submitted,

WILLIAM F. CONOUR
CONOUR-DOEHRMAN
1 Indiana Square, Suite 1725
Indianapolis, IN 46204
Attorney for The Indiana Trial Lawyers Association

RICHARD M. SKUTT
220 Bagley, Suite 808
Detroit, MI 48226-1412
Attorney for The Michigan Trial Lawyers Association

JEFFREY WHITE
1050 - 31st Street, N.W.
Washington, DC 20007
Attorney for The Association of Trial Lawyers of America

ELLEN M. BOWDEN
400 Washington Avenue
Montgomery, AL 36104-4344
Attorney for Southern Poverty Law Center

DANIEL A. ROTTIER
Counsel of Record
DAVID E. SUNBY
HABUSH, HABUSH, DAVIS ROTTIER, S.C.
150 East Gilman Street, Suite 2000
Madison, WI 53703
Attorneys for Wisconsin Academy of Trial Lawyers

BRIAN J. LAMPERT
Chairman Amicus Committee
DON, HILLER & GALLEHER
1737 Gaylord Street
Denver, CO 80206
Attorney for The Colorado Trial Lawyers Association

STEVEN J. CROWLEY
P.O. Box 945
Burlington, IA 52601
Attorney for The Iowa Trial Lawyers Association